No. 16368

United States Court of Appeals
For the Ninth Circuit

RAYONIER INCORPORATED, a corporation, *Appellant*,
vs.
UNITED STATES OF AMERICA, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S MEMORANDUM IN ANSWER TO APPELLEE'S PETITION FOR REHEARING

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INDEX

CITATIONS

Cases

Texts:

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TO THE HONORABLE WALTER L. POPE, CALVERT MAGRUDER AND CHARLES M. MERRILL, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

This Memorandum is filed in response to the invitation of the Court.

There Is No Intra-Circuit Conflict

The Government suggests (Pet. p. 1):

> "that these cases should be reheard *en banc*, primarily because of the conflict between certain critical holdings in this Court's opinion and rulings on the same issue in an earlier appeal of these cases."[1]

[1] The earlier appeals were *Rayonier Incorporated v. United States*, 225 F.2d 642 (9th Cir. 1955); *Arnhold, et al. v. United States, et al.*, 225 F.2d 650 (9th Cir. 1955).

The Government's premise is false because the judgment and opinion in the earlier appeals is a nullity and without legal significance. No conflict is presented.

In our appeal to the United States Supreme Court from the 1955 decision of this Court, we discussed and presented to the Supreme Court all of the matters in the first appeal opinion which the Government now says present an "intra-circuit" conflict or disagreement. In our brief to the Supreme Court we then said (p. 84):

> "Whether this Court does or does not reverse the courts below on the basic question of immunity of the Government from liability for acts of public firemen — and we believe it will, it is of primary importance that this Court correct the gross error of the Court of Appeals in its misconstruction of the amended complaint. Not only has the Court of Appeals greatly prejudiced petitioner, but we earnestly believe the opinion to be bad law which should not be permitted to stand with the precedental authority attaching to a case which is reviewed by the Supreme Court of the United States."

It was because of our argument that the Supreme Court said:[2]

> " * * * Furthermore, it has been strongly contended here that the Court of Appeals improperly interpreted certain allegations in the complaints and as a result of such misinterpretations incorrectly applied Washington law in passing on the sufficiency of these allegations. In view of the circumstances, we think it proper to *vacate both judg-*

[2] *Rayonier Incorporated v. United States,* 352 U.S. 315, at pp. 320, 321.

> *ments in their entirety* so that the District Court may consider the complaints anew, in their present form or as they may be amended, *wholly free* to determine their sufficiency * * * " (Italics supplied)

It is not common for the Supreme Court to specify that a judgment is vacated *in its entirety* nor to remand the case to the District Court *wholly free* to act. The Supreme Court's language was no happenstance or carelessly composed statement.

Our exceptions to the Court of Appeals opinion were properly before the Supreme Court to rule on, and had that Court intended that the Court of Appeals opinion be other than a nullity it would have ruled specifically on our exceptions. Furthermore, when the Supreme Court remanded the case to the District Court "wholly free" to determine the sufficiency of the complaints, it could mean only that the Court of Appeals opinion was to be completely disregarded and treated as of no effect whatever. It follows that this Court is equally free to disregard the prior opinion.

The section of our brief to the Supreme Court last referred to was not answered or discussed by the Government in its answering brief and, tacitly at least, was confessed by the Government. We do not deem it appropriate here to repeat our presentation to the Supreme Court on these matters, but if this Court wishes us to do so, we will be glad to furnish it with copies of the Supreme Court briefs.

This Court should note that since the Supreme Court decision in these cases on January 28, 1957, the Court

of Appeals decision in the first appeal has not been cited by any court as authority for any proposition, so far as we can ascertain, and could not be cited with propriety because it was vacated in its entirety.

The Washington Law Is As Assumed By This Court

In its opinion filed in these cases October 26, 1960, this Court said (Slip Op. p. 4):

> "Though we have been referred to no Washington case on the point, we may assume the Washing law to be laid down in *Palsgraf v. Long Island RR Co.,* 248 N.Y. 339, 162 N.E. 99 (1928), and In Restatement, Torts, § 281(b) (1934) * * * "

The *Palsgraf* case has been quoted and cited with approval a number of times by the Washington Supreme Court, *e.g., Freeman v. Navarre,* 47 Wn.2d 760, 289 P. 2d 1015 (1955); *Sitarek v. Montgomery,* 32 Wn.2d 794, 203 P.2d 1062 (1949); *Kennett v. Yates,* 41 Wn.2d 558, 250 P.2d 962 (1952).

Restatement, Torts, § 281, is cited with approval in *McFarland v. Commercial Boiler Works,* 10 Wn.2d 81, 116 P.2d 288 (1941). This Court has cited § 281 with approval in a case appealed from the United States District Court for the Western District of Washington. See *States S.S. Co. v. Rothschild International Stevedoring Co.,* 205 F.2d 253 (9th Cir. 1953).

The "New York" Rule Is Not The Law in Washington

The rule peculiar to decisions of the State of New York (and Pennsylvania to a limited extent) referred to (Slip Op. p. 5), to the effect that direct and immedi-

ate connection between the negligent act and the damage is necessary for liability, is not the law in Washington, and the fact that the fire, negligently burning, may have passed over intervening lands before reaching appellant's property does not immunize the Government from liability for its negligence. *Conrad v. Cascade Timber Co.,* 166 Wash. 369, 7 P.2d 19 (1932).

Proximate Cause Was Proved

The respondent argues that the negligence of Government employees was not a proximate cause of appellant's damage.

We call attention to Part II of this appellant's Opening Brief, pages 54 to 72. The Government's Answering Brief did not answer that part of our Opening Brief and, in fact, during the course of the oral argument before this Court on May 10, 1960, it was rather clearly conceded that there is no quarrel as to the correctness of the applicable principles of law as stated in Part II of our Opening Brief.

"Foreseeability" is the test of proximate cause in Washington, and this Court accurately points out (Slip Op., pp. 4, 5) that appellant's damage was foreseeable as within the risk of harm created by the Government's negligence.

This Court very properly stated (Slip Op., p. 4) that the negligence found by the trial judge was not negligence in the abstract. The record shows uncontroverted facts and the unanimous opinion of the experts for the Government as well as of the experts for appellant, that the fire could have and would have been suppressed

in its initial stages by prompt, vigorous and continuous action which Government employees negligently failed to take. There is nothing in the record upon which the District Court could, as a matter of law, find that "It has not been established by a preponderance of the evidence that had such negligence not existed the fire would have been contained in the 60-acre area, or that there is any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area." For fuller discussion of this point, we refer the Court to pages 36 to 54 of our Opening Brief.

Even if we assume, arguendo, as the Government contends, that Amended Finding XVI is susceptible to interpretation that it was a finding of no proximate cause, that contention is answered in toto by the record of undisputed facts, the unanimous opinion of experts and the district court's findings of negligence and foreseeability. The record is tantamount to and requires findings that: (1) had the Forest Service employees not been negligent the fire would have been extinguished in its initial stages, and (2) had the fire been so extinguished it would not have spread to the 1600 acres and would not have damaged appellant. The burden of proof was fully met by appellant. There simply cannot be any other conclusion under the facts. This Court correctly held (Slip Op. p. 6) that any other conclusion would be speculative. Therefore this Court properly directed entry of judgment for appellant. See cases cited at page 53 of our Opening Brief.

Conclusion

The appellee's petition for rehearing should be denied. There is no intra-circuit conflict. There is nothing in this Court's opinion filed October 26, 1960 that is contrary to Washington law. Nothing is presented in the petition that was not or could not have been presented by appellee in its brief or in its argument. No novel questions are involved.

Respectfully submitted,

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